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No. 91-1824

In The

Supreme Court Of The United States

OCTOBER TERM, 1991

MARTHA JO POINTER,
Petitioner,
v.
CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT and the CITY OF FARMERS BRANCH
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

1. Is bankruptcy court permission required before a creditor, such as Petitioner Martha Jo Pointer, has standing to assert that a post-petition claim for ad valorem tax liens of another creditor violates the automatic stay of 11 U.S.C. §362 and is therefore invalid?

2. Does a Chapter 11 "Debtor-in-Possession," such as Petitioner Martha Jo Pointer, have standing to bring an action to avoid the attachment of ad valorem tax liens arising during the course of another bankruptcy case, either in that case or in her own bankruptcy?

3. Does the automatic stay imposed by 11 U.S.C. §362 prevent post-petition "automatic perfection" of ad valorem tax liens against real property of the bankrupt estate?

LIST OF PARTIES

MARTHA JO POINTER:
Appellee below and Petitioner herein

CARROLLTON-FARMERS BRANCH
INDEPENDENT SCHOOL DISTRICT:
Appellant below and Respondent herein

CITY OF FARMERS BRANCH:
Appellant below and Respondent herein

TABLE OF CONTENTS

	Page
Questions presented for review	i
List of parties	ii
Table of contents	iii
Table of authorities	v
Opinions Below	ix
Statement of jurisdiction	x
Statutes	xi
Brief	1
Statement of the case	1
Statement of facts	1
Course of Proceedings	2
Summary of the argument	4
Argument and Authorities	5
Question Number 1 Restated	5
1.A. Pointer should have utilized the proper procedure in the bankruptcy court	5
1.B. Section 362(h) does not apply here	10
1.C. The Fifth Circuit properly examined Pointer's standing under 11 U.S.C. §549(a)	11
Question Number 2 Restated	12
2.A. Pointer was not a "debtor-in-possession" when the liens attached	12
2.B. 11 U.S.C. §505 does not aid Pointer	14
2.C. 28 U.S.C. §2201 does not grant standing to Pointer	16
2.D. The Fifth Circuit properly utilized the law of standing	17

TABLE OF CONTENTS — (Continued)

	Page
Question Number 3 Restated	19
3.A. The Fifth Circuit does not adopt the Fourth Circuit's rule on post-petition liens by implication or otherwise	19
3.B. The automatic attachment of ad valorem tax liens versus the section 362 stay	20
(i) The liens at issue validly attached notwithstanding Section 362	21
(ii) These liens would be valid even if they did constitute an "act" ordinarily proscribed by Section 362(a)	24
Conclusion	26
Prayer	27
Certificate of Service	28

TABLE OF AUTHORITIES
CONSTITUTIONS AND STATUTES

Page

FEDERAL:

U.S. Const. Art III, §2, cl. 2 16
11 U.S.C. §101(50) 11
11 U.S.C. §362(a) 13, 14, 19, 20, 21, 23, 24
11 U.S.C. §362(b)(3) 14, 24
11 U.S.C. §362(h) 10
11 U.S.C. §505 ..... 14, 15, 16, 17
11 U.S.C. §506(c) 10, 17
11 U.S.C. §545 ..... 11, 12
11 U.S.C. §546(b) 14, 24, 25, 26
11 U.S.C. §549(a) 6, 11, 19, 20
28 U.S.C. §158(a) 3
28 U.S.C. §960 26
28 U.S.C. §1254(1) x
28 U.S.C. §1291 3
28 U.S.C. §2201 ..... 16, 17

STATE:

TEX. CONST. art VIII, §15 25
TEX. CONST. art XVI, §50 25
TEX. TAX CODE ANN. §32.01
(Vernon Supp. 1992) 12, 15, 21, 25
TEX. TAX CODE ANN. §32.07
(Vernon 1982) 15

PROCEDURAL RULES:

Fed. R. Civ. P. 58 3
Fed. R. Civ. P. 79(a) 3
Bankruptcy Rule 8001(a) 3

TABLE OF AUTHORITIES — (Continued)

Page

CASES:

American Postal Workers Union of Los Angeles, AFL-CIO v. United States Postal Service, 861 F.2d 211 (9th Cir. 1988) 17

In re Bellman Farms, Inc., 86 B.R. 1016 (Bankr. D.S.D. 1988) 22

In re Bigalk, 75 B.R. 561 (Bankr. D.Minn. 1987) 14

In re Brooks, 79 B.R. 479 (9th Cir. BAP 1987), *aff'd*, 871 F.2d 39 (9th Cir. 1989) 11, 18

Capps v. Humble Oil and Refining Co., 536 F.2d 80 (5th Cir. 1976) 16

In re Carlisle Court, 36 B.R. 209 (Bankr. D.D.C. 1983) 22

Carr v. Alta Verde Industries, Inc., 931 F.2d 1055 (5th Cir. 1991) 17

In re Chernicky Coal Company, Inc., 67 B.R. 828 (Bankr. W.D.Pa. 1986) 7, 8

Collin County, Texas v. Homeowner Ass'n for Values Essential to Neighborhoods (HAVEN), 915 F.2d 167 (5th Cir. 1990) 17

Matter of Delta Towers, Ltd., 924 F.2d 74 (5th Cir. 1991) 10

In re Electric City, Inc., 43 B.R. 336 (Bankr. W.D.Wash. 1984) 11

Equibank, N.A. v. Wheeling-Pittsburgh Steel Corporation, 884 F.2d 80 (3d Cir. 1989) 21, 22, 25

Guaranty National Insurance Co., v. Gates, 916 F.2d 508 (9th Cir. 1990) 17

In re Guterl Special Steel Corporation, 111 B.R. 107 (W.D.Pa. 1990), *aff'd sub nom., Makaroff v. City of Lockport*, 916 F.2d 890 (3rd Cir. 1990) 23

TABLE OF AUTHORITIES — (Continued)

Page

CASES:

In re Illinois-California Exp., Inc.,
50 B.R. 232 (Bankr. D.Colo. 1985) 13

In re Klefstad,
95 B.R. 622 (Bankr. W.D.Wis. 1988) 24

In re Louisiana World Exposition, Inc.,
832 F.2d 1391 (5th Cir. 1987) 8, 9

In re Martin,
106 B.R. 334 (Bankr. D.Me. 1989) 24

Maryland National Bank v. Mayor and City Council of Baltimore,
723 F.2d 1138 (4th Cir. 1983) 24

In re McKeesport Steel Castings Company,
799 F.2d 91 (3d Cir. 1986) 9, 10

Matter of Missionary Baptist Foundation of America, Inc.,
796 F.2d 752 (5th Cir. 1986) 11, 20

In re Munoz,
111 B.R. 928 (Bankr. D.Colo. 1990) 7

In re Parque Forestal, Inc.,
949 F.2d 504 (1st Cir. 1991) 9, 10

In re Parr Meadows Racing Association, Inc.,
880 F.2d 1540 (2nd Cir. 1989) 22

Matter of Pointer,
952 F.2d 82 (1992) 4, 6, 10, 11

Matter of Reserves Development Corp.,
821 F.2d 520 (8th Cir. 1987) 14

In re v. Savino Oil & Heating Co.,
91 B.R. 655 (Bankr. E.D.N.Y. 1988) 6, 7

Sikes v. Global Marine, Inc.,
881 F.2d 176 (5th Cir. 1989) 11, 14, 20

Skelly Oil Co. v. Phillip's Petroleum Co.,
339 U.S. 667, 70 S.Ct. 876 (1950) 17

TABLE OF AUTHORITIES — (Continued)

Page

CASES:

Slaughter v. Qualls,
139 Tex. 340, 162 S.W.2d 671 (1942) 11, 14, 20

Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan,
883 F.2d 345 (5th Cir. 1989) 17

Stanford v. Butler,
826 F.2d 353 (5th Cir. 1987) 15, 23, 24

In re Toledo Equipment,
35 B.R. 315 (Bankr. N.D.Ohio 1983) 7

United States v. Phillips,
267 F.2d 374 (5th Cir. 1959) 15

Valley Forge Christian College v. Americans United for Seperation of Church and State, Inc.,
454 U.S. 464, 102 S.Ct. 725 (1982) 17

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Matter of Pointer*, 952 F.2d 82 (5th Cir. 1992).

The Opinion of the United States District Court for the Northern District of Texas is not reported.

The Opinion of the United States Bankruptcy Court for the Northern District of Texas is reported as *In re Pointer*, 113 B.R. 285 (Bankr. N.D.Tex. 1990).

JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. §1254(1). The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 14, 1992. That court denied Martha Jo Pointer's Motion for Rehearing on February 11, 1992.

STATUTES

FEDERAL:

11 U.S.C. §362 (a) (4)

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a) (3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a) (3)), operates as a stay, applicable to all entities, of —

(4) any act to create, perfect, or enforce any lien against property of the estate.

11 U.S.C. §362(b) (3)

The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a) (3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a) (3)), does not operate as a stay —

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e) (2) (A) of this title.

11 U.S.C. §362(h)

An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

STATUTES — (Continued)

11 U.S.C. §505 (a) (1)

Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to a tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

11 U.S.C. §545(2)

The Trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien —

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C. §546(b)

The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection. If such law requires seizure of such property or commencement of an action to accomplish such perfection, and such property has not been seized or such action has not been commenced before the date of the filing of the petition, such interest in such property shall be perfected by notice within the time fixed by such law for such seizure or commencement.

STATUTES — (Continued)

11 U.S.C. §549 (a) (2) (B)

Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate —

(2) (B) that is not authorized under this title or by the court.

28 U.S.C. §960

Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

28 U.S.C. §2201 (a)

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an anti-dumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relation of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATUTES — (Continued)

STATE

TEX. CONST. art. VIII, §15

The annual assessment made upon landed property shall be a special lien thereon; and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the payment of all the taxes and penalties due by such delinquent; and such property may be sold for the payment of the taxes and penalties due by such delinquent, under such regulations as the Legislature may provide.

TEX. TAX CODE ANN. §32.01

On January 1 of each year, a tax lien attaches to property to secure the payment of all taxes, penalties, and interest ultimately imposed for the year on that property, whether or not the taxes are imposed in the year the lien attaches. The lien exists if favor of each taxing unit having power to tax the property.

TEX. TAX CODE ANN. §32.07

(a) Except as provided by Subsection (b) of this section, property taxes are the personal obligation of the person who owns or acquires the property on January 1 of the year for which the tax is imposed. A person is not relieved of the obligation because he no longer owns the property.

(b) The person in whose name a property is required to be listed by Section 25.13 or 25.15 of this code is personally liable for the taxes imposed on the property.

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT (hereinafter referred to as "CFBISD"), Respondent herein, and files this, its BRIEF IN OPPOSITION, for which it would respectfully show the Court as follows:

STATEMENT OF THE CASE

A. Statement of Facts:

The facts in this case are, for the most part, stipulated. Gerald Pointer built an apartment complex, known as the "Valwood Village Apartments" (hereinafter referred to as

the "Property") in Farmers Branch, Texas. In or about 1977, he sold the apartments and accepted a promissory note secured by a deed of trust that granted him a lien on the Property. In 1982, Gerald and his wife, Martha Jo Pointer (hereinafter referred to as "Pointer"), were divorced. As part of the divorce decree, Martha Jo Pointer was awarded the promissory note and the deed of trust.

In 1986, the Property, after having changed hands several times, was owned by Valwood Village Apartments, Ltd. (hereinafter referred to as "VVAL"). VVAL took the Property subject to Pointer's lien. VVAL was forced into involuntary bankruptcy under Chapter 7 of the United States Bankruptcy Code on April 25, 1986. The bankruptcy case against VVAL is currently pending in the Northern District of Texas.

On November 16, 1987, Pointer filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. Later, on June 9, 1988, the bankruptcy court presiding over VVAL's estate granted Pointer's motion to lift the stay so as to allow her to foreclose her lien on the Property. Pointer was the low bidder at the ensuing foreclosure sale, and took the Property into her bankruptcy estate. Pointer's bankruptcy case also remains pending in the Northern District of Texas, and this case is an adversary proceeding within that bankruptcy case.

B. Course of Proceedings:

On or about January 10, 1990, Pointer filed her Complaint to Determine Extent, Validity and Priority of Liens (hereinafter referred to as the "Complaint") against CFBISD and the City of Farmers Branch (hereinafter referred to as the "City") (CFBISD and the City sometimes referred to collectively as the "Taxing Units") in the United

States Bankruptcy Court for the Northern District of Texas, Dallas Division. The bankruptcy court handed down a Memorandum Opinion on April 13, 1990, and the Corrected Judgment was entered on June 5, 1990. Among other things, that court held that the Taxing Units did not hold valid liens to secure payment of 1987 and 1988 ad valorem taxes on the Property and "to the extent any such liens attached to the Property by operation of law, they are hereby declared void, invalid, and of no effect." Corrected Judgment of Bankruptcy Court at 3. (R.164). That court also held that the Taxing Units did hold valid liens to secure ad valorem taxes for the years 1985 and 1986 but that those liens did not secure the payment of penalties or other costs associated with or attributable to the 1985 or 1986 ad valorem taxes.

The Taxing Units duly filed for appeal to the United States District Court for the Northern District of Texas, pursuant to 28 U.S.C. §158 (a) and Bankruptcy Rule 8001 (a), which confer appellate jurisdiction on a District Court from a final decision of a bankruptcy court. The District Court upheld the decision of the bankruptcy court via a Memorandum Opinion signed on November 8, 1990, filed on November 14, 1990, and entered on the Docket, pursuant to Fed. R. Civ. P. 58 and 79 (a), on November 15, 1990.

Thereafter, the Taxing Units duly filed for appeal to the United States Court of Appeals for the Fifth Circuit, pursuant to 28 U.S.C. §1291. On January 14, 1992, that Court affirmed the District Court's ruling with regard to the penalties and other costs associated with the 1985 and 1986 ad valorem taxes but reversed the District Court with regard to the validity of the liens securing payment of the 1987 and 1988 ad valorem taxes. The Fifth Circuit held that Pointer did not have the statutory standing necessary to

bring suit to avoid said liens. *Matter of Pointer*, 952 F.2d 82, 89 (5th Cir. 1992) (Petition, A-19). Pointer duly filed a Motion for Rehearing, which was denied by the Fifth Circuit on February 11, 1992.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Fifth Circuit held that Pointer does not have standing to avoid the attachment of the ad valorem tax liens which arose post-petition in the VVAL bankruptcy. Pointer argues that the court erred in so holding, and cites to various statutes under which she could ostensibly have standing in the VVAL bankruptcy case, as well as in her own bankruptcy case. Her arguments are, however, unpersuasive.

Pointer has failed to rebut the Fifth Circuit's requirement that she, as a creditor in the VVAL bankruptcy case, seek permission from that bankruptcy court before prosecuting an action to avoid the liens at issue. She has further failed to show how she could properly maintain standing in her own bankruptcy case so as to avoid the liens. She attempts to confuse the issues by asserting new and unfounded bases for standing and by claiming that the court had an ulterior motive in denying her standing, but these attempts cannot stand. Pointer simply failed to utilize the proper procedure for avoiding the liens. That is, she should have sought permission from the VVAL bankruptcy court to prosecute an avoidance action when the liens were a part of that bankruptcy estate. It is difficult to establish standing in one court to litigate issues rightfully reviewed in another.

Further, even if this Court were to reach the issue of the validity of the liens, it would find that the liens validly attached to the Property notwithstanding the VVAL stay. This is because no act is undertaken in order for the liens to

attach. Thus, the stay provision of the Bankruptcy Code is simply not violated thereby. Also, even if the liens were otherwise violative of the stay, they are valid in this case nevertheless, in that they secure a pre-petition interest.

Therefore, Pointer cannot adequately rebut the Fifth Circuit's holding in this case. Her Petition should be denied.

ARGUMENT AND AUTHORITIES
QUESTION NUMBER 1 (RESTATED)

> Is bankruptcy court permission required before a creditor, such as Petitioner Martha Jo Pointer, has standing to assert that a post-petition claim for ad valorem tax liens of another creditor violates the automatic stay of 11 U.S.C. §362 and is therefore invalid?

1.A. Pointer should have utilized the proper procedure in the bankruptcy court.

The arguments set forth under Question No. 1 in Pointer's Petition for Writ of Certiorari (hereinafter referred to as her "Petition") actually cover much more ground than the heading might imply. The question of whether bankruptcy court permission is required before a creditor in Pointer's position may properly challenge such transfers as the attachment of tax liens is addressed in subparts 1.D. and 1.E. of Pointer's Petition, pages 22-31.

Pointer argues that the United States Court of Appeals for the Fifth Circuit has developed a "ludicrous" requirement that a creditor in Pointer's position seek bankruptcy court approval before acting on behalf of the trustee or debtor-in-possession in a bankruptcy case. This argument focuses on that part of the Opinion of the Fifth Circuit, after it had concluded that Pointer lacks, at this point, the requisite statutory standing to avoid the liens in question, wherein the court states:

> Our conclusion does not mean that a creditor whose lien on property of the debtor is clearly diminished by the attachment of a statutory lien has no recourse. A creditor may bring an avoidance action under §549 [of the Bankruptcy Code], but only after moving the bankruptcy court for authorization to act on behalf of the trustee or debtor-in-possession.

Matter of Pointer, 952 F.2d at 88. (Petition, A-17). Through all of her attack on the Fifth Circuit's reasoning, Pointer never really explains why she did not seek relief in the VVAL bankruptcy case. At the time the liens in question arose, that is, January 1, 1987 and January 1, 1988, the Property was a part of the VVAL estate. Thus, Pointer was a creditor of that estate at that time, and the Property was subject to determinations of that bankruptcy court at that time. Pointer did nothing, and there is no evidence that the debtor-in-possession or trustee unjustifiably failed to prosecute an avoidance action. What the Fifth Circuit is telling Pointer, and similarly situated creditors, is that if a tax lien or some other exigency arises which will diminish the creditor's lien on property, she must act to avoid that situation and she must do so by means of the proper procedure.

To support this rule, the Fifth Circuit cites to several authorities, including *In re V. Savino Oil & Heating Co.*, 91 B.R. 655 (Bankr. E.D.N.Y. 1988). That case instructs that individual creditors, as a general rule, have no authority to institute avoidance actions. Upon a showing to the bankruptcy court of particularly extraordinary circumstances, however, it is not outside the powers of the bankruptcy court to authorize an avoidance action on behalf of a bankruptcy estate by an individual creditor thereof. *Id.* at 656-57. Pointer argues that such extraordinary circumstances exist here. The only circumstances refered to by Pointer, however, are those arising after the Property left

the VVAL estate, and Pointer ceased to be a creditor thereof. Thus, "extraordinary circumstances," as envisaged by the *Savino* court, do not exist here. Moreover, even if they arguably so existed, the Supreme Court of the United States is not the forum within which to raise such a contention. Pointer should have exhausted her remedies within the VVAL bankruptcy case and given the bankruptcy court with jurisdiction over that case the opportunity to decide the issues she now raises. That court would be in a far better position than any appellate court to make such a determination.

Pointer also attempts to distinguish *Savino* by stating that, in the case at bar, no one asserted any stay violation while the Property was in the VVAL estate, whereas such a violation was asserted in *Savino*. That fact does not distinguish *Savino* in any important aspect, but it does expose Pointer's primary problem herein. She should have taken some action while the Property was in the VVAL court to avoid the liens.

To support the holding that creditors such as Pointer must utilize the proper procedures to protect their interests, the Fifth Circuit also relies upon *In re Munoz* 111 B.R. 928 (Bankr. D.Colo 1990), in which it was held to be imperative that a creditor seek approval of the bankruptcy court before asserting an avoidance power, and *In re Toledo Equipment* 35 B.R. 315 (Bankr.N.D.Ohio 1983), in which it was held that a creditor must first make a showing that the debtor-in-possession has unjustifiably failed to prosecute a preference action before the creditor may so prosecute. The court also relies upon *In re Chernicky Coal Company, Inc.*, 67 B.R. 828 (Bankr. W.D.Pa, 1986), in which it was held that an individual creditor could assert a claim even though he had not sought bankruptcy court authorization, but could do so only under appropriate circumstances.

Pointer tries to distinguish *Toledo* by pointing out that the bankruptcy case at issue there was a chapter 11 case, while the VVAL bankruptcy was filed under chapter 7. That distinction is, of course, meaningless for our purposes and does not change the general rule as it applies here. Pointer attempts to rely on *Chernicky Coal* and claims that appropriate circumstances exist herein. As stated earlier, however, such circumstances did not exist when Pointer was a creditor of the VVAL estate and this Court is not the proper forum in which to litigate such a contention.

Pointer cites to *In re Louisiana World Exposition, Inc.*, 832 F.2d 1391 (5th Cir. 1987) to stand for the proposition that a creditor need not seek action by the debtor-in-possession before pursuing an action in bankruptcy court. This reliance is of little value in the present case. The *Louisiana World* court held that a creditors' committee had standing to pursue an action without first requesting the debtor-in-possession to act. That court stated that, as a general rule, 1) the claim of the creditors' committee must be colorable, 2) the debtor-in-possession must have refused unjustifiably to pursue the claim, and 3) the creditors' committee must receive leave to sue from the bankruptcy court. *Id.* at 1397. Pointer argues that since the *Louisiana World* court did not require the creditors' committee to seek action by the debtor-in-possession in that case, Pointer should likewise be allowed to proceed without the restraint of such a prerequisite. However, the rationale upon which that court based its waiver of certain prerequisites is distinguishable from the case at bar.

In *Louisiana World*, the creditors' committee had asked the debtor-in-possession to file suit with regard to issues closely related to those raised by the complaint of the committee. The debtor-in-possession refused to maintain the

requested action. *Id.*, 832 F.2d at 1397-98. Conversely, Pointer never requested anything in the VVAL bankruptcy case with regard to nullifying the tax liens at issue here. Whereas the *Louisiana World* court had some evidence upon which to base a finding that the debtor-in-possession would not have acted even if requested, this Court cannot know what might have happened in the VVAL bankruptcy case if Pointer had requested some action. Whereas the *Louisiana World* debtor had previously been requested to act and refused, no one in the VVAL bankruptcy was given the opportunity.

Further, the *Louisiana World* court had a reason for granting standing. As that court points out:

> . . . since we in any event hold adversely to the [creditors'] [c]ommittee on the merits, we find it . . . unnecessary to now go through the empty, formalistic ritual of remanding the case . . . and [then again have the committee] present its complaint, so that we may deny it on the merits.

Id., 832 F.2d at 1398. Thus, the *Louisiana World* court was predisposed to deny the committee's claim on the merits and found the formalistic standing requirements, which could be cured in that case via time consuming remands, to be in conflict with judicial economy. That case, therefore, presents a completely different set of circumstances than this case, and provides no comfort to Pointer, who never sought any action in the VVAL bankruptcy court.

Similarly, Pointer's reliance on *In re McKeesport Steel Castings Company*, 799 F.2d 91 (3d Cir. 1986), and *In re Parque Forestal, Inc.*, 949 F.2d 504 (1st Cir. 1991) are misplaced. *McKeesport Steel* is distinguishable in that the creditor therein was seeking to remedy non-action on the part of the debtor-in-possession. Not only had there been a request

for action, but a hearing on the failure of the debtor to act. Such a fact situation vastly differs from that presented in the present case. The same is true of *Parque Forestal*. As in *McKeesport Steel*, that case involved section 506(c) of the Bankruptcy Code. The creditors were the only ones who would zealously pursue the claim because their interests were at odds with the interests of the debtor-in-possession. *Parque Forestal*, 949 F.2d at 512. This same type of fact situation underlies the ruling in *Matter of Delta Towers, Ltd.*, 924 F.2d 74 (5th Cir. 1991), also cited by Pointer. Pointer, whose interests were not in direct conflict with the interest of the VVAL estate, cannot properly rely on these cases in order to claim that she need not seek action by that estate or approval of the VVAL bankruptcy court. VVAL had an interest in nullifying the tax liens at issue while the Property was a part of that bankruptcy estate. There is no evidence to show that action by the VVAL trustee would have been impossible or improbable had Pointer only requested.

1.B. Section 362(h) does not apply here.

Pointer argues that the Fifth Circuit was too quick to conclude that 11 U.S.C. §362(h), which provides for the recovery of actual damages by individuals injured by willful stay violations, does not grant her standing to bring this suit. As pointed out by the Fifth Circuit, however, Pointer has never sought the type of damages provided by section 362(h) and has not claimed to have been damaged by a willful stay violation. *See Matter of Pointer*, 952 F.2d at 86. (Petition, A-12). Pointer is here seeking to invalidate the tax liens at issue. This is not the stuff of which section 362(h) claims are made, and it would be improper to base standing on section 362(h) when Pointer is not seeking the relief provided thereby.

1.C. The Fifth Circuit properly examined Pointer's standing under 11 U.S.C. §549 (a).

As pointed out in the Opinion of the Fifth Circuit in this cause, attachment of a lien on property of the estate is clearly a "transfer" of property. *See Matter of Pointer*, 952 F.2d at 87 (Petition, A-13) and 11 U.S.C. §101(50). The assertion of a lien is a post-bankruptcy transfer, and is subject to possible invalidation, if at all, under section 549. *See Pointer*, 952 F.2d at 87, n.7 (Petition, A-29); *In re Electric City, Inc.*, 43 B.R. 336, 342-43 (Bankr.W.D. Wash. 1984).

Having resolved that lien attachment constitutes a transfer of property, the liens in question would constitute post-petition transfers since they arose after the filing of the VVAL petition. A post-petition transfer of property may be avoided by the trustee under §549. *Matter of Missionary Baptist Foundation of America, Inc.*, 796 F.2d 752, 764 (5th Cir. 1986); *In re Brooks*, 79 B.R. 479, 480 (9th Cir. BAP 1987), *aff'd*, 871 F.2d 89 (9th Cir. 1989).

Pointer argues that the Fifth Circuit back-handedly validated the liens via its ruling in this case. That is a mischaracterization of the court's function, however. It is the trustee's duty to move for the invalidation of post-petition transfers. *See, e.g., Missionary Baptist*, 796 F.2d at 764 (wherein the court states that the trustee *is entitled to invalidate* transfers that violate the stay). This rule comports to the general rule that actions taken in violation of the stay are voidable, not void. *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989); and that which is voidable operates to accomplish the thing sought until the fatal vice has been judicially declared. *See Slaughter v. Qualls*, 139 Tex. 340, 162 S.W.2d 671, 674 (1942).

Pointer further argues that the Fifth Circuit should have analyzed her standing under section 545 instead of section

549. Section 545 is addressed to the trustee, however, and Pointer fails to explain how the calculus would differ thereunder. She also does not explain why it is error to determine the power to avoid post-petition transfers under section 549. The fact is that Pointer, as an individual creditor, would not have standing under either section and the Fifth Circuit did not err in applying section 549 to Pointer's situation.

QUESTION NUMBER 2 (RESTATED)

> Does a Chapter 11 "Debtor-in Possession", such as Petitioner Martha Jo Pointer, have standing to bring an action to avoid the attachment of ad valorem tax liens arising during the course of another bankruptcy case, either in that case or in her own bankruptcy?

2.A. Pointer was not a "debtor-in-possession" when the liens attached.

Pointer argues that she has standing in her own bankruptcy case to challenge the validity of the liens at issue. In formulating her argument, however, she misconstrues the facts of this case and misapplies the law thereto. Pointer claims to have been a debtor-in-possession as of November 16, 1987, the date her petition-in-bankruptcy was filed. *See* Pointer's Petition at 33. While that may be true, she was not the debtor-in-possession of the Property at issue here. She did not take possession of the Property until on or after June 9, 1988, the date on which the VVAL bankruptcy court lifted the stay and allowed her to foreclose her lien on the Property. It was not until that time that the Property became a part of Pointer's estate and she a "debtor-in-possession" for our purposes.

The liens in question arose on January 1, 1987 and January 1, 1988, pursuant to TEX. TAX CODE ANN. §32.01 (Vernon Supp. 1992). On both of these dates, the Property

was subject to the VVAL bankruptcy. If these liens were able to be invalidated, it would be because of the stay imposed by the *VVAL bankruptcy* case. Pointer attempts to confuse the issues in her Petition, but the issue as to voidability was a question for the VVAL bankruptcy court to decide. Pointer's Complaint sought to avoid the liens based upon the automatic stay of section 362. The only stay in effect on the Property on January 1, 1987 and January 1, 1988 was that of the VVAL estate. The issue becomes then, whether Pointer, as a creditor in the VVAL case, may utilize the avoidance power necessary to invalidate the liens. The Fifth Circuit was correct in its analysis of this issue.

Pointer argues that the filing of her petition in November of 1987 operated as a stay against the tax lien arising January 1, 1988. Unfortunately, the Bankruptcy Code does not support her contention. She relies upon 11 U.S.C. §362 (a) (4), which states:

> (4) any act to create, perfect or enforce any lien against *property of the estate*.

11 U.S.C. §362 (a) (4) (emphasis added). As mentioned earlier, the Property at issue here did not become "property of the estate" in the Pointer bankruptcy case until after June 9, 1988. Therefore, as the plain language of section 362 (a) (4) reads, the Pointer bankruptcy petition did not operate as a stay against anything that happened with regard to the Property before that time. *See, e.g., In re Illinois-California Exp., Inc.*, 50 B.R. 232 (Bankr. D.Colo. 1985) (automatic stay provisions are inapplicable as far as they concern property which is not part of the estate and which does not belong to the debtor). The fact that the Property *later* became part of the Pointer bankruptcy estate has no bearing on the calculus. For property to pass into a bankruptcy estate, and then to be subject to the protection of the

automatic stay, the debtor must have had an interest in that property as of the commencement of the bankruptcy case. *In re Bigalk*, 75 B.R. 561 (Bankr. D.Minn. 1987). All of the relevant activity took place pre-petition vis-a-vis the Property's relationship to the Pointer bankruptcy estate. By the time the Property entered the Pointer estate, the liens had already attached and been perfected, subject only to invalidation in the VVAL bankruptcy case.

Pointer would argue that the liens were not merely subject to invalidation, but were void ab initio. As stated earlier, however, such a stance conflicts with the general rule regarding the section 362 stay. Even if the liens in question were violative of the stay, they would not be void. Acts taken in violation of the stay are voidable, not void. *Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989). This rule is bolstered by the fact that a lien which is ostensibly violative of section 362(a)(4) is able to be revived via section 546(b) and 362(b)(3). Further, liens which would otherwise be invalid may be pursued when the property leaves the estate. *See Matter of Reserves Development Corporation*, 821 F.2d 520 (8th Cir. 1987). If a lien were void from its inception, it could never be cured because it simply would be nugatory and of absolutely no effect. *See Sikes*, 881 F.2d at 178. At this point, then, the liens that arose during the VVAL bankruptcy are valid subject to possible invalidation. *See Slaughter v. Qualls*, 139 Tex. 340, 162 S.W.2d 671, 674 (1942). As the issues in this case involve the VVAL automatic stay and the time frame within which the Property was a part of the VVAL estate, the VVAL bankruptcy court would clearly be the proper forum in which to bring such an avoidance action.

2.B. 11 U.S.C. §505 does not aid Pointer.

Pointer further argues that she has standing, pursuant to 11 U.S.C. §505, to bring an avoidance action in her

bankruptcy case. She has heretofore never claimed to be bringing an action pursuant to section 505, and raises the issue for the first time on appeal. Nevertheless, section 505 does not apply to the facts of this case, and Pointer can find no comfort in the terms thereof. Her complaint sought to invalidate certain liens that arise under Texas law to secure the payment of ad valorem taxes. Section 505 states that a court:

> may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to a tax . . .

11 U.S.C. §505 (a) (1). The problem Pointer faces in relying on this provision, however, is that she is not seeking to determine the validity of a tax, fine, penalty or addition to a tax. She is, rather, seeking to determine the validity of liens. The liens are the security for the tax, not the tax. *See* TEX. TAX CODE ANN. §32.01 (Vernon Supp. 1992). A tax lien is merely a security established by statute of which the taxing authority may avail itself in the event of a default in payment. *United States v. Phillips*, 267 F.2d 374, 377 (5th Cir. 1959). The lien adds nothing to the tax, and does not give rise to the tax. The lien arises each January 1 regardless of whether any taxes are imposed in that year. TEX. TAX CODE ANN. §32.01 (Vernon Supp. 1992). The lien cannot be avoided merely because it arises before the amount of taxes due for a given year has been assessed. *See Stanford v. Butler*, 826 F.2d 353, 357 (5th Cir. 1987). Further, even if an action were brought which effectively extinguished a tax lien, the taxes themselves would not be invalidated. There would continue to be, at the very least, personal liability for the taxes. TEX. TAX CODE ANN. §32.07 (Vernon 1982). Therefore, even if Pointer did have standing under section 505, that provision does not apply to this case.

2.C. 28 U.S.C. §2201 does not grant standing to Pointer.

Pointer, for the first time on appeal, is also claiming to be bringing an action for declaratory judgment pursuant to 28 U.S.C. §2201. Here again, she is attempting to confuse the issues involved in this case.

Section 2201 cannot be utilized by Pointer if, as she claims, she is bringing this action pursuant to 11 U.S.C. §505. Her remedy, if any, would lie within section 505. Section 2202 creates an additional cause of action when a federal court already has jurisdiction,

> . . . except with respect to Federal taxes . . . *a proceeding under section 505 or 1146 of Title 11* . . .

28 U.S.C §2201 (emphasis added).

Further, Pointer argues that, since this is a declaratory judgment action, the standard of review the Fifth Circuit should have employed is the "abuse of discretion" standard. Interestingly, CFBISD properly reported in its brief to the Fifth Circuit that the review to be undertaken was de novo. (See Fifth Circuit Brief of CFBISD at 3). Pointer did not argue this point. Obviously, she was not bringing a declaratory judgment action.

She is now asserting a new theory upon which to base recovery. Unless it comes under an exception to the general rule, and this case does not, a party cannot properly raise a new theory on appeal that was not raised or passed upon by the lower court. *Capps v. Humble Oil and Refining Co.*, 536 F.2d 80, 82 (5th Cir. 1976). Also, this Court does not have original jurisdiction over a declaratory judgment action. *See* U.S. Const. Art. III, §2, c1.2. Therefore, Pointer cannot now bring this issue here.

Also, Pointer may not properly rely solely upon 28 U.S.C. §2201 as a basis for standing. Standing to sue is a

preliminary question to be considered by a court as a limitation to its jurisdiction. *American Postal Workers Union of Los Angeles, AFL-CIO v. United States Postal Service*, 861 F.2d 211, 213 (9th Cir. 1988). Standing is essential to the exercise of jurisdiction, and "can be raised at any time" including on appeal "by a party or by the court." *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 348 (5th Cir. 1989). Standing is a question of subject matter jurisdiction. *See Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055 (5th Cir. 1991). Those who do not possess standing may not litigate in federal court. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475-76, 102 S.Ct. 752, 760 (1982). 28 U.S.C. §2201 is remedial only. It does not extend the jurisdiction of federal courts. *Collin County, Texas v. Homeowners Ass'n for Values Essential to Neighborhoods (HAVEN)*, 915 F.2d 167, 170-71 (5th Cir. 1990). It does not confer an independent basis for jurisdiction. *Guaranty National Insurance Co. v. Gates*, 916 F.2d 508, 511 (9th Cir. 1990). *See also Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72, 70 S.Ct. 876, 879 (1950). Therefore, to the extent Pointer claims 28 U.S.C. §2201 as an independent basis for standing, such a reliance is ineffectual. Just as jurisdiction cannot be founded solely on §2201, neither can standing. Thus, Pointer cannot base standing upon tying Section 2201 to her 11 U.S.C. §505 claim, nor by relying solely upon Section 2201.

2.D. The Fifth Circuit properly utilized the law of standing.

Pointer finally claims, in general terms, that the Fifth Circuit misapplied the law on standing. The arguments under that subheading are, however, less than persuasive. She claims, among other things, that she "is not asking the court to undo something that has occurred, . . . she seeks a

declaration that an event never occurred, as found by the lower court." Petition at 42. As discussed earlier, however, acts in violation of the automatic stay, even if the liens were a violation, are voidable, not void. Further, the lower court did not hold that these liens were a non-act. The Bankruptcy Court's Judgment reads:

> . . . neither the City nor the ISD holds a lien against the Property to secure payment of 1987 and 1988 ad valorem taxes on the Property, *and to the extent any such liens attached to the Property* by operation of law, they are hereby declared void, invalid and of no effect.

Bankruptcy Court Judgment, at 3 (emphasis added). (R.164). Thus, the Bankruptcy Court did not, as Pointer argues, declare the liens to be non-acts and the Fifth Circuit did not improperly circumvent the finding of the lower courts.

Pointer closes by attempting to distinguish *In re Brooks*, 79 B.R. 479 (9th Cir. BAP 1987), *aff'd*, 871 F.2d 89 (9th Cir. 1989). *Brooks* was cited by the Fifth Circuit in a footnote merely to establish some of the very basic principles at work here. Even if it were successfully distinguished by Pointer, it would not change the court's overall analysis. Further, Pointer is not able to distinguish *Brooks* in any meaningful ways. She focuses on minor factual points, such as when deeds of trust were filed, and the fact that the *Brooks* were divorced. While these facts may be interesting, they are not relevant to our analysis. The Fifth Circuit cites to the statement of the *Brooks* court, that:

> if the debtor or the trustee choose not to invoke the protections of §362, no other party may attack any acts in violation of the automatic stay.

Brooks 79 B.R. 479, 481 (9th Cir. BAP 1987). Obviously the Fifth Circuit did not cite this as a hard-and-fast rule, for it

continues by showing the circumstances under which a creditor, like Pointer, may properly seek relief.

The analysis employed by the Fifth Circuit was correct in this case. Pointer cannot successfully challenge it, and therefore her Petition should be denied.

QUESTION NUMBER 3 (Restated)

> Does the automatic stay imposed by 11 U.S.C. §362 prevent post-petition "automatic perfection" of ad valorem tax liens against real property of the bankrupt estate?

The Fifth Circuit did not reach the issues raised in Question 3 of Pointer's Petition. The Fifth Circuit properly found that Pointer does not have standing to assert these issues at this time. Nevertheless, should this Court grant Pointer's Petition and further decide to hear issues not addressed by the Court of Appeals, it will find that the Taxing Units hold valid liens for the years 1987 and 1988.

3.A. The Fifth Circuit does not adopt the Fourth Circuit's rule on post-petition liens by implication or otherwise.

As discussed earlier, the Fifth Circuit properly examined Pointer's standing to avoid the liens in question via 11 U.S.C. §362 and §549. In so doing, that court did not adopt the standard established by the Fourth Circuit in *Maryland National Bank v. Mayor and City Council of Baltimore*, 723 F.2d 1138 (4th Cir. 1983) with regard to whether the automatic attachment of the liens violate the section 362 stay. Rather, that court specifically stated that:

> We are unable to address that issue here, however, because we hold that Pointer lacked standing under the Bankruptcy Code to avoid the post-petition tax liens as violative of the stay.

Matter of Pointer, 952 F.2d at 83. (Petition, A-2). What the court does not specifically detail, and what has caused Pointer such confusion, is why she needs standing if the liens did not attach.

In order to avoid these liens as violative of section 362, something has to be done to invoke section 362. *See, e.g., In re Brooks*, 79 B.R. 479, 481 (9th Cir. BAP 1987), *aff'd*, 871 F.2d 89 (9th Cir. 1989) (If the debtor or the trustee chooses not to invoke the protections of 362, *no other party may attack any acts in violation of the automatic stay);* and *In re Electric City, Inc.*, 43 B.R. 336, 342-43 (Bankr W.D.Wash. 1984) (The assertion of a lien as a post-bankruptcy transfer could be *subject to invalidation* under §549). After all, acts taken in violation of the section 362 stay are voidable, not void. *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989), and that which is voidable operates to accomplish the thing sought until the fatal vice has been judicially declared. *Slaughter v. Qualls*, 139 Tex. 340, 162 S.W.2d 671, 674 (1942). A transfer of property made in violation of the stay constitutes an unauthorized post-petition transfer which may be avoided under section 549 *Matter of Missionary Baptist Foundation of America, Inc.*, 796 F.2d 752, 764 (5th Cir. 1986). These are the rules the Fifth Circuit utilized in its disposition of this cause. It clearly did not delve into the philosophical depths alleged by Pointer.

3.B. The automatic attachment of ad valorem tax liens versus the section 362 stay.

Nevertheless, should this Court decide to reach the issues not addressed by the Fifth Circuit, it will find that the liens in questions validly attached to the Property.

(i) The liens at issue validly attached notwithstanding section 362.

State law determines when a lien for property tax arises. *Equibank, N.A. v. Wheeling-Pittsburgh Steel Corporation*, 884 F.2d 80, 84 (3d Cir. 1989). Under Texas law:

> On January 1 of each year, a tax lien attaches to property to secure the payment of all taxes, penalties, and interest ultimately imposed for the year on that property.

TEX. TAX CODE ANN. §32.01 (Vernon Supp. 1992). The tax lien attaches automatically, without any act from any taxing unit, and is impressed:

> . . . whether or not the taxes are imposed in the year the lien attaches.

Id. The tax lien exists, therefore, regardless of any assessment or any action whatsoever.

Pointer's argument is that, because the attachment of a tax lien is an attempt to create or perfect a lien against property of the estate, the liens should be deemed invalid. Section 362 (a) of the Bankruptcy Code Provides:

> [A bankruptcy] petition filed . . . operates as a stay, applicable to all entities of . . .
>
> (4) any *act* to create, perfect, or enforce any lien against property of the estate.

11 U.S.C. §362 (a) (emphasis added). Pointer's argument must fail in this case because no act to create or perfect the lien is performed by any taxing unit, nor is any act required of them. Thus, the automatic imposition of the lien does not violate the stay provision. The only thing that would keep the lien from attaching is for January 1 not to occur. When January 1 arrives, the lien automatically attaches without any act being performed.

In dicta, the Second Circuit rejected the "no act" argument in *In re Parr Meadows Racing Association, Inc.*, 880 F.2d 1540, 1545 (2d Cir. 1989). However, *Parr Meadows* and the cases cited thereby deal with statutory schemes that are fundamentally different from the ad valorem taxation process in Texas. When Pointer asks this Court to "establish a single rule to be applied equally in all circuits" (Petition at 48), she exposes her misunderstanding of the rule that whether a lien arises is a matter of state law and that the statutory schemes involved will differ from state to state and, *a fortiori*, from circuit to circuit. The *Parr Meadows* court takes time to point out that its decision depends heavily on the state law involved. *Parr Meadows*, 880 F.2d at 1548.

The "no act" argument was taken up in dicta by the *Parr Meadows* court due to the fact that the New York statute involved therein expressly requires "affirmative acts" on the part of government before a tax lien can arise. *Id.* at 1544-45. The same is true of the statutes involved in the cases cited by the *Parr Meadows* court and relied upon by Pointer. For example, in *In re Beliman Farms, Inc.*, 86 B.R. 1016 (Bankr. D.S.D. 1988), the South Dakota scheme at issue provided that a lien arises each January 1 to secure payment of taxes *assessed*, and *found* to be *due* and *owing* for the *previous* year. *Bellman Farms*, 86 B.R. at 1019. As with the New York scheme at issue in *Parr Meadows*, this procedure is completely the reverse of that provided by Texas law. Likewise, citations to *Equibank, N.A. v. Wheeling-Pittsburg Steel Corp.*, 884 F.2d 80 (3d Cir. 1989) and *In re Carlisle Court*, 36 B.R. 209 (Bankr. D.D.C. 1983) are misplaced for purposes of dispelling the "no act" argument as applied under Texas law. Although the *Equibank* court, citing *Carlisle Court*, holds that tax liens that do not arise until after the effective date of the stay are invalid, it was

apparently not confronted with the argument that the liens arose without the necessity of any affirmative act and it does not explain the reasoning upon which it relies. The *Equibank* court cites only to *Carlisle Court*, which says that in the "broad application" of the stay provision, the "creation" of a lien is barred. *Carlisle Court*, 36 B.R. at 214. However, we are never informed as to what is meant by "broad application" or "creation", and the court cites only to the statute, which of course bars only an *act* to create, perfect, or enforce a lien. 11 U.S.C. §362 (a) (4) Pointer also cites to *In re Guterl Special Steel Corporation*, 111 B.R. 107 (W.D.Pa. 1990) *aff'd sub nom. Makaroff v. City of Lockport*, 916 F.2d 890 (3d Cir. 1990). The *Guterl* court, however, is merely discussing *Parr Meadows*, which of course construes New York Law.

The District Court rested its decision that the lien imposition is an act violative of the stay at least in part upon the conclusion that the definition of "act to create" includes those acts, which under Texas law take place well after the lien is perfected, and possibly after the bankruptcy case is dismissed, necessary to assess the amount of taxes owed for a given year. *See* Memorandum Opinion of District Court at p.7 n.7. (Pointer Petition at C-28). Pointer also places great reliance on this rationale. *See* Petition at 50. This point provides no comfort to Pointer, however.

The lien which arises under Texas law each January 1 is not an imperfect one. It is perfected when it arises and cannot be avoided merely because it arises before the amount of taxes due for a given year has been computed or formally assessed. *See Stanford v. Butler*, 826 F.2d 353, 357 (5th Cir. 1987). Pointer argues that the subsequent acts do constitute an "act" as proscribed by section 362, and cites to *Parr Meadows* and its construction of New York law. *See* Petition at 50-51. This case, however, concerns the state law of

Texas. Citations to New York law and cases construing same simply do not aid the calculus. Thus, since property tax liens in Texas arise automatically each January 1 with no antecedent nor subsequent acts necessary in order for them to be established, the stay provision of section 362 is simply not violated thereby.

(ii) These liens would be valid even if they did constitute an "act" ordinarily proscribed by section 362 (a).

Even if the imposition of the liens did constitute an act violative of the section 362 stay, they would be valid nevertheless. This is because they attach post-petition to secure a pre-petition interest, thereby meeting the requirements of section 362(b)(3) and 546(b) of the Bankruptcy Code, which carve out an exception to the stay provision. The Taxing Units have an interest in the property that can be described not only as pre-existing the petition, but also as ever-present. It should be noted, however, that the circuits are split on this issue.

The Fourth Circuit, in *Maryland National Bank v. Mayor and City Council of Baltimore*, 723 F.2d 1138 (4th Cir. 1983), held that the taxing unit's imposition of its post-petition tax lien was valid and that the creditor-mortgagee who had the stay lifted would be liable for the taxes which the lien secured. *Also See Stanford v. Butler*, 826 F.2d 353, 357 (5th Cir. 1987). One reason given by the *Maryland National* court to support its holding is that the interest held by the taxing unit under Maryland law is "ever present," and therefore the liens can be perfected post-petition. *Id.*, 723 F.2d at 1142-43. The *Maryland National* rationale has been cited in the Seventh Circuit and the First Circuit. *See In re Klefstad* 95 B.R. 622 (Bankr. W.D.Wis. 1988); *In re Martin*, 106 B.R. 334 (Bankr. D.Me. 1989).

Yet the *Parr Meadows* court, 880 F.2d 1545 (2d Cir. 1989), held that the taxing unit, acting under New York law, "did not possess, prior to the filing of the bankruptcy petition, a sufficient 'interest in property' to qualify for the §546(b) exception." *Id.* at 1548. The Third Circuit reached the same holding as *Parr Meadows*, but by citing to *Parr Meadows* and not by its own, independent analysis. *See Equibank, N.A. v. Wheeling-Pittsburgh Steel Corporation*, 884 F.2d 80 (3d Cir. 1989).

CFBISD, as a political subdivision of the State of Texas, has a pre-existing interest in all land upon which a tax lien arises. The basis of the tax lien is derived from article VIII, section 15 of the Texas Constitution, which refers to the lien imposed on the annual assessment as "special." It reads:

> The annual assessment made upon landed property shall be a special lien thereon . . .

TEX. CONST. art. VIII, §15. CFBISD realizes that the word "annual" appears in this provision, but that word clearly refers to the assessment and the lien, which CFBISD agrees only occur on an annual basis. What must be borne in mind, however, is that the state, and CFBISD as a political subdivision thereof, have an ever-present interest in the property which allows, *inter alia*, the assessment of the property each and every year. This interest is evident in the fact that a lien attaches to all real property in the state each and every January 1, even without any affirmative act by any governmental unit. TEX. TAX CODE ANN. §32.01 (Vernon Supp. 1992). It also can be seen in article XVI, section 50 of the Texas Constitution, which excepts from the homestead exemption taxes due upon the property, as well as the powers of eminent domain and condemnation, and so forth. Certainly, in Texas at least, the state's "interest" in the property does not arise merely coincidentally with the

imposition of the lien. This reasoning would fail to take into account the interest which gives rise to the power to provide for a lien in the first instance.

Moreover, in this particular case, an even more specific interest predates the petition. A pre-existing interest in the Property accrued when it was still within the VVAL bankruptcy, via 28 U.S.C. §960, which provides for the tax liability of the trustee for taxes due in the VVAL bankruptcy. Section 960 provides:

> Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

28 U.S.C. §960. Consequently, CFBISD was able to assess and levy on the Property while it was in the VVAL bankruptcy. When it left that bankruptcy, it carried with it that assessment, which preexisted Pointer's stay vis-a-vis the Property. Therefore, the liens may validly attach pursuant to section 546(b) in order to perfect that pre-existing interest. Thus, the liens are not void even if they would otherwise violate the section 362 stay.

CONCLUSION

The Fifth Circuit correctly addressed the issue of Pointer's standing herein. It was well within its powers to determine standing even though the issue was not addressed by the Bankruptcy Court or the District Court. Pointer, in her Petition, is unable to show any valid basis upon which this Court can reverse the decision of the Fifth Circuit, for she has not shown any viable claim of standing to litigate the issues involved herein at this time. Further, the Fifth Circuit did not undertake any grand philosophical

scheme to rule on a potential stay violation by ruling on standing. Rather, the court has cleared up the procedure within which creditors similarly situated to Pointer may seek redress.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent Carrollton-Farmers Branch Independent School District respectfully requests that this Honorable Court deny Pointer's Petition for Writ of Certiorari and for such other and further relief to which it may be justly entitled.

Respectfully submitted,

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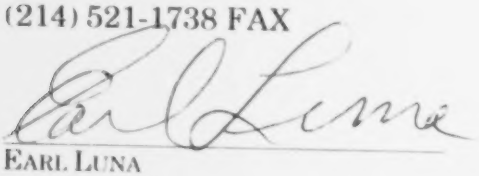

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent Carrollton-Farmers Branch Independent School District's Brief in Opposition was served on the parties listed below via hand delivery or certified mail, return receipt requested, postage prepaid, on this 9th day of June, 1992:

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